IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.114 OF 2006

Nandkishor Anandrao Acharya ...Petitioner

v/s

Harikrishandas T. Pabari and ors. ...Respondents

Mr P.K. Dhakephalkar i/b Mr S.V. Dhakephalkar for Petitioner.

Mr Rajeev Narulla i/b M/s Jhangiani Narulla and Associates for Respondent Nos.1 and 2.

Mr I.S. Mecwan for Respondent No.3.

WITH

ARBITRATION PETITION NO.119 OF 2006

Shri Rajendra Anandrao Acharya ...Petitioner

v/s

Shri Harkishandas T. Pabari and ors. ...Respondents

Mr Girish Kulkarni with Mr I.S. Mecwan and Mr R.S. Tripathi for Petitioner.

Mr Rajeev Narulla i/b M/s Jhangiani Narulla and Associates for Respondents.

CORAM : D.K. DESHMUKH J.

DATE : 11TH OCTOBER 2006.

P.C. :-

1. By both these petitions filed under section 34 of the Arbitration and Conciliation Act 1996, same award made by the learned Sole Arbitrator is challenged. Therefore, these petitions can be conveniently disposed off by a common order. The facts that are material and relevant for deciding these petitions are that the petitioners in both these petitions and the respondents entered into a memorandum of understanding dated 20th July 1994. In that memorandum of understanding, there was an arbitration clause contained by which Shri R.C. Sampat was named as an Arbitrator. The disputes arose between the parties, they were referred to the learned Arbitrator. The learned Arbitrator made an award, that award was challenged in this Court by the present petitioners by filing arbitration petition No.225 of 1990 and arbitration petition No.295 of 1990. Both these petitions were decided by this Court by order dated 28th September 1998. By that order, this Court set aside the award made by the learned Arbitrator. By paragraph 8 of that order, this Court clarified that it will be open to the parties to move afresh. As the

record of the arbitrator was called by this Court, the Office of the Court was directed to send back the original record to the Arbitrator. It appears that after the order was made by this Court, the respondents again approached the Arbitrator and the arbitration proceedings were commenced. At that juncture, an objection was raised on behalf of the petitioners that the Arbitrator has become functus officio and therefore, the arbitration proceedings cannot be continued. The learned Arbitrator however held that he has power to continue with the arbitration proceedings. Thereafter, it appears that the parties filed their pleadings, evidence was led and the learned Arbitrator made an award. By the award, the learned Arbitrator has held that the memorandum of understanding dated 20th July 1994 entered into between the parties is binding upon the parties and the learned Arbitrator has made the award granting specific performance of that memorandum of understanding. It is this award which is challenged by way of these petitions.

2. The learned counsel appearing for petitioners first submits that the memorandum of understanding was not a concluded contract between the parties. The learned counsel submits that in the memorandum of understanding it is clearly stated that there is a building standing on the land which is owned by the

petitioners, having ground and first floor and which is fully occupied by the tenants. The leaned counsel submits that in the memorandum of understanding itself it is recited that consent of the tenants would be necessary. Admittedly, no consent whatsoever has been obtained by any of the parties and the learned Arbitrator has issued direction for obtaining consent of the tenants by the award. The learned counsel further submits that from the memorandum of understanding it appears that the parties on the date on which the memorandum of understanding was entered into, were not sure as to whether the entire building was to be reconstructed by pulling down the existing structure or only additional floors are to be put up on the existing building. The learned counsel further submits that in the memorandum of understanding there is a provision for the petitioners to give one parking space in the compound of the adjoining building owned by the petitioners on such terms as may be agreed upon between the parties. The learned counsel further submits that there is a recital in the memorandum of understanding that the petitioners will provide entrance to the purchasers of the construction in the new building from the adjoining building, but the terms on which such entrance is to be provided, the location of entrance are all undecided. The learned counsel further submits that in the memorandum of understanding it is also not

decided as to whether ownership rights in the land will be conveyed or only perpetual lease would be granted. In the submission of the learned counsel therefore, existence of all these terms in the memorandum shows that the memorandum of understanding was not a concluded contract and therefore, a decree of specific performance of such a contract could not have been made. The learned counsel submits that perusal of the award shows that even the learned Arbitrator has found that these terms are not settled but the learned Arbitrator has relied on a map prepared during the arbitration for making an award in relation to the parking space in the adjoining building as also for providing access and entrance from the adjoining building though the report of the Architect was never accepted. The learned counsel submits that even if it is assumed that a concluded contract between the parties comes into existence if the parties have agreed upon material terms of the contract, then also in the present case, there is no agreement even on the material terms. The memorandum of understanding shows that the parties have not decided as to what type of even major construction is to be raised on the land. According to the learned counsel therefore, looking at the matter from any point of view, it cannot be said that there is a concluded contract arrived at between the parties.

3. It is further submitted that the memorandum of understanding was essentially a development agreement where obtaining of consent of the tenants was essential. According to the learned counsel, reconstruction of the building was impossible without the tenants giving consent and vacating the portions occupied by them in the existing building. In the submission of the learned counsel therefore, in view of the stand taken by the tenants, it was impossible for the petitioners to get the existing building vacated by the tenants and therefore, in no case an award for specific performance could have been made. The learned counsel next submits that in view of the order passed by this Court in the earlier round of litigation between the parties, the respondents were obliged to invoke the arbitration clause in terms of provisions of section 21 of the Arbitration and Conciliation Act 1996 and it is only after following the procedure laid down under section 21 that the arbitration proceedings could have been commenced afresh as envisaged by this Court. The learned counsel submits that when the objection was raised, perusal of the order or communication from the Arbitrator or the award shows that the learned Arbitrator has assumed the jurisdiction only because the original record of the earlier round of proceedings moved before the Arbitrator were directed to be sent back to him by this Court. The learned counsel submits

that firstly, the letter dated 12th October 1998 written by the respondents to the leaned Arbitrator relied on by the respondent does not comply with he requirements of section 21 and secondly, this is not the ground on which the learned Arbitrator has assumed the jurisdiction. According to the learned counsel, if this Court finds that the reason given by the learned Arbitrator for assuming jurisdiction is wrong then the assumption of jurisdiction cannot be justified by the respondents on some other ground, the only option available to this Court on finding that the reason given by the Arbitrator is wrong, is to set aside the award. It was further submitted that an objection was raised before the learned Arbitrator that he is biased and therefore he is not qualified to continue with the arbitration proceedings. According to the learned counsel, that objection has not been decided by the learned Arbitrator. It was further contended that the respondents themselves have written a letter repudiating the contract and therefore, they could not have applied for specific performance of the same agreement.

4. In so far as the first contention is concerned, the learned counsel appearing for petitioners submits, relying on a judgment of the Supreme Court, that it is not necessary for bringing about a concluded contract that the parties must have agreed for each and

every term of the contract. According to the learned counsel, if the respondents establish that the parties have agreed on material terms of the contract, then minor and subsidiary terms either can be worked out by consent of the parties by the Court or the Court can issue appropriate direction. According to the learned counsel, the terms about parking space in the adjoining building, right of entrance from the adjoining building are minor or subsidiary terms, they do not perform key role in the agreement and therefore, according to the learned counsel, it cannot be said that it is a tentative agreement and not a firm or concluded contract between the parties. The learned counsel then submits, relying on several judgments of this Court as also of the Supreme Court that agreement of development can be specifically enforced. According to the learned counsel, assuming that this is an agreement for development, even then the law does not prevent the Arbitrator from making a decree or award for specific performance of the agreement. According to the learned counsel, all the major terms are agreed upon, there is a recital in he agreement for transfer of property in favour of the respondents and therefore, this agreement cannot be termed as only an agreement to develop the land. The learned counsel submits that though by the agreement, obligation was cast on the petitioners to obtain consent of the tenants, they did nothing in the

matter and therefore, now they are trying to take advantage of their own wrong by saying that without the tenants vacating the premises, the construction cannot be done and therefore, an award for specific performance could not have been made. The learned counsel further submits that vacation of portion occupied by the tenants is not an impossibility, it can be brought about by holding negotiations with the tenants. According to the learned counsel, only because tenants are staying on the property, a decree for specific performance of an agreement which contemplates execution of conveyance in favour of the respondents cannot be denied. The learned counsel further submits that it is clear from the order of this Court referred to above that the arbitration proceedings could have been started afresh. To that end, the respondents have written letter dated 12th October 1998 to the learned Arbitrator to resume the proceedings, copy of that letter was given to the petitioners. In the submission of the learned counsel, this substantially complies with the provisions of section 21 and therefore, the learned Arbitrator has rightly resumed the proceedings and it cannot be said that he had become functus officio. The leaned counsel pointed out that even objection on bias has no substance because Mr Sampat, the Arbitrator was named Arbitrator who was known to both the parties. Even the ground of bias which is alleged was in existence when the parties

had agreed to name him as Arbitrator. The learned counsel further submits that the alleged repudiation of contract cannot be relied on because it was made during the course of talks of settlement between the parties. It is made clear that the learned counsel appearing for respondents relied on several judgments of the Supreme Court as also this Court. I do not propose to deal with those judgments because in my opinion, so far as the propositions that have been laid down by those judgments are not in dispute. The only question is application of those propositions to the facts of this case. It can be taken as a settled proposition of law that if the parties have agreed on major or material terms of the contract which are necessary for carrying out the purpose for which the parties have entered into the contract, then it can be said that the parties have arrived at a concluded contract. Keeping this settled principle of law in mind if one goes through the memorandum of understanding, it is found that initially the agreement recites :-

> "There is a building standing on the said property consisting of ground and first floor which are occupied by the tenants / occupants."

. Then it is further recited that :-

"The Vendors are entitled to construct and / or reconstruct additional floor/s on the existing building by utilising, consuming and exploiting F.S.I. at the ratio of 1:2 in accordance with the Development Control Rules and in accordance with the plans that may be sanctioned by the Bombay Municipal Corporation."

. It is further recited that :-

"The Vendors have offered to sell their respective 50% undivided share, right, title and interest in the said property including right to exploit, utilise, consume and take advantage of the F.S.I. in respect of the said property as may be permitted by the concerned authorities and as per the plans that may be sanctioned by the Municipal Corporation and / or other authority or authorities to the Purchasers or their nominee or nominees and the Purchasers have accepted the said offer."

. This recital shows that the petitioners had agreed to sell their undivided share in the property

with the right to utilise the F.S.I. to the respondents. But when the operative part of the agreement comes, it becomes clear that this offer was not accepted as it is by the purchases inasmuch as in clause 3 of the agreement, instead of the petitioners selling their right to exploit the F.S.I., the respondents were required to obtain permission from the planning authority for utilisation of the F.S.I. Then comes clause 5 which is quoted as under :-

> "5. The Vendors shall obtain the consent of tenants / occupants for reconstruction of the said property for constructing / reconstructing additional floor/s on the said existing building in accordance with the plans sanctioned by the B.M.C. It shall be duty, responsibility and liability of the Vendors to arrive at arrangement and / or agreement with the tenants / occupants to accord their consent for carrying out construction / reconstruction of the said building. The Purchasers will extend their assistance and cooperation to the Vendors in arriving at the agreements with the tenants / occupants."

. Perusal of the above quoted clause 5 shows that though in clause 3 it was contemplated that

petitioners will obtain permission for reconstruction, in clause 5 both the options were kept open viz. (1) reconstruction of the entire building and (ii) construction of additional floors on the building. If the building is to be reconstructed, obviously the tenants will have to vacate the existing structure so that it can be pulled down for reconstruction of the new building. The tenants in that event will either have to be paid or a promise will have to be made to them for giving tenements in the new building, probably it also may be necessary to provide alternate accommodation to them. On the contrary, if only additional floors are to be constructed without disturbing the present structure, it may not be necessary for the tenants to vacate the premises or it may become necessary for them to vacate the existing premises during the construction activities. Therefore, so far as the tenants are concerned and settlement with the tenants is concerned, the most crucial aspect is whether the parties want to reconstruct the entire building or they merely want to construct additional floors on the existing building. It is clear from clause 5 above that there was no definite decision made by the parties in that regard. Whether the parties want to put up entirely new building by demolishing existing structure or they want to add floors to the existing structure, in my opinion, is a crucial term on which the entire agreement depends.

Therefore if the parties are not yet agreed on the nature of the construction to be made, in my opinion, it cannot be said that there is a concluded contract between the parities. It is an admitted position that the building plans were never sanctioned pursuant to the memorandum of understanding. Therefore, one cannot draw any inference as to the nature of construction to be carried out on the basis of those building plans. Perusal of the award shows that the leaned Arbitrator has given following direction in relation to the tenants:-

> "(d) I direct the Respondents to comply with their obligations under the said Memorandum of Understanding with the co-operation of Disputants in obtaining of the consent of the tenants / occupants of the property within one month from this award."

. Thus, a direction has been issued to the petitioners by the award to obtain consent of the tenants. When the ground on the basis of which such consent could be obtained is itself not clearly defined either by the agreement or by the award, one does not understand how the petitioners can comply with this direction. The learned counsel appearing for petitioners submits that as to how consent of the

tenants is to be obtained is a matter to be dealt with at the execution and has no bearing on the question where specific performance is to be granted or not. In my opinion, the submission is devoid of any substance because while making a decree for specific performance, the Court will have to form an opinion whether the obligation for the purpose of which Court will issue direction is possible to be complied with or not. If the Court finds that obligation cannot be performed, then the Court will not be justified in making a decree and leaving it to the executing Court to work out such obligation. It is further pertinent to note that the witness of the petitioners had in clear terms stated that the tenants are not agreed to give any consent. A letter written by the tenants was also produced. In any case, it is nobody's case that the tenants had made any promise for vacating of the premises or had made any offer. In my opinion, as the tenants are admittedly staying on the property, if the building is to be reconstructed, the entire settlement has to be worked out with the tenants, if only additional floors are to be put up, even then their consent is necessary. In such a situation, in my opinion, it was impossible for the Arbitrator to make an award for specific performance. In my opinion, one more aspect though it is not argued by both the sides, ought to have been considered by the learned Arbitrator and which this

Court is under a duty to consider while considering the question whether the award is to be allowed to remain in force or not viz. grant of decree of specific performance of such a nature would obviously have an impact on the interest of the existing tenants. Admittedly, tenants are not parties to the arbitration proceedings. Therefore, there is no question of the tenants being parties before the Arbitral Tribunal. In such a situation, in my opinion, it was not within the jurisdiction of the Arbitral Tribunal to issue any direction in relation to the tenants.

5. It is further to be seen here that clause 6(a) of the memorandum of understanding between the parties reads as under :-

> "6(a) Vendors shall provide to the Purchasers or their nominees one earmarked parking space in the compound of the building known as Shingne Building belonging to the Vendors on terms and conditions that may be mutually agreed upon or settled at an appropriate time and a suitable pathway / entrance therefrom to the nominee / nominees of the Purchasers to pass and repass to and from the tenement to be allotted to the new occupant / occupants of the structure to be constructed on the said

property, with due regard to safety and security."

. By the abovesaid clause, the petitioners agreed to handover to the respondents one parking space in the adjoining building owned by the petitioners on such terms as may be mutually agreed. It is common ground that such term was never be agreed. The learned counsel for respondents submits that this is not a major or material term of the contract. Even assuming that to be so, this will constitute an independent agreement for handing over to the respondents one parking space in the adjoining building. The terms on which the said parking space is to be handed over are not decided, still the learned Arbitrator has issued direction in his award in this regard which reads as under :-

"(f) I direct the Respondents to earmark a car parking space as shown in the sketch plan alongwith the report dated 20/02/2002 Architect H.M. Panchal in Shingne Building compound and hand over the same to the Disputants on consideration / payment of Rs.10,000/- in lump sum at the time of Commencement Certificate."

. In so far as the objection of the petitioners

that the terms on which parking space to be handed over are not decided, the learned Arbitrator observes thus :-

> "The nature of pathway, parking space and space for storing material to be provided has been clearly pointed out by the Architect of the Disputants by letter dated 20th February 2002 alongwith the plan which is submitted before the Arbitrator and served on the Respondents and is not objected to."

. In my opinion, the observations quoted above of the learned Arbitrator show extreme casual approach of the learned Arbitrator. He has not at all dealt with the contention that there is no concluded contract between the parties in relation to the parking space in the adjoining building. Obviously therefore, this part of the award cannot be allowed to stand. So far as the second part of the above quoted clause in the memorandum of understanding i.e. providing entrance to the purchasers of the tenements in the new building from the adjoining building is concerned, in any way this cannot be termed as not to be integral part of the memorandum of understanding. The terms on which the entrance is to be provided are not decided. The memorandum of understanding states that the location of the entrance will be decided with regard to the safety and security.

Obviously therefore, there was no concluded contract for providing entrance and pathway from the adjoining building. The learned Arbitrator has dealt with this aspect of the matter in paragraph 11(2)(iv) which reads as under :-

> "11(2)(iv) That the Respondents' contentions that there is no specific understanding regarding entrance / pathway, space for storing material and parking space to be provided to the Disputants is absolutely baseless as the Respondents themselves have committed breach of the said obligation. The nature of pathway, parking space and space for storing material to be provided has been clearly pointed out by the Architect of the Disputants by letter dated 20th February 2002 alongwith the plan which is submitted before the Arbitrator and served on the Respondents and is not objected to."

. The above observations clearly show that there is no finding recorded that there is a concluded contract between the parties in so far as the access and entrance are concerned, still in the award specific performance of that term has been granted. The relevant clause is clause 14(g) of the award which reads as under

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> "14(g) I direct Respondents to make available a pathway passing over the Shingne Building property for ingress and egress purpose to the occupants of the building to be constructed on the said property as at time of Commencement Certificate, as shown in the sketch plan alongwith the report dated 20/02/2002 of Architect H.M. Panchal."

. In my opinion therefore, the above quoted portion of the award firstly show that a direction for specific performance was issued by the learned Arbitrator in a most casual manner and secondly in relation to the part of the memorandum of understanding which by no stretch of imagination can be said as concluded contract.

6. The learned Sole Arbitrator was an Arbitrator named in the memorandum of understanding. He had made the award in favour of the respondents, that was challenged before this Court. While setting aside the awards, this Court made following observations :-

> "7. The question did arise in the circumstances after quashing the award whether

the matter is to be remitted back to the same Arbitrator. The only provisions are sections 33 and 34(a). That power is to be exercised before an award is set aside. I do not propose to go into that question in these matters as I am setting aside the Award.

8. It is, however, made clear that it is always open to the parties to move afresh in which event the time taken would be saved by virtue of section 43(4) of the Arbitration and Conciliation Act 1996.

9. In the circumstances of the case there shall be no order as to costs.

10. Office is directed to send back the original records to the Arbitrator."

. Thus, this Court has set aside the award and left the parties to their remedy for initiating fresh arbitration. Therefore, it can be safely assumed that the arbitration clause between the parties did not come to an end and continued to exist and therefore, in terms of paragraph 8 of the order of this Court quoted above, the arbitration proceedings are to be commenced afresh and therefore, in my opinion, section 21 of the said Act

has to be complied with. Section 21 reads as under :-

> "21. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

. Perusal of section 21 shows that in order to commence the arbitral proceedings, the claimant has to make a request to the respondent for referral of the dispute to arbitration and the date on which that request is received by the respondent is the date of commencement of the arbitral proceedings. In the present case, an objection regarding jurisdiction of the learned Arbitrator to recommence the arbitral proceedings was raised. The arbitrator made an order on 18th December 1998. Paragraphs 2 and 3 of that order are relevant which read as under :-

> "In the light of clause 13 of Memorandum of understanding dated 20.07.84 and in view of the observation of Hon'ble High Court in its order dated 28.09.98, it appears that the Hon'ble Court has not changed the Arbitrator appointed by all the parties and hence

> original record have been sent back to me in order to enable the parties to move afresh before me.
>
> Hence I am unable to accept the request of the said Acharyas of not conducting the arbitration meeting before me. I now fix arbitration meeting before me on Wednesday, the 6th January 1999 at 4 p.m. at my office."

. It is clear from the above that according to the learned Arbitrator, as the High Court has not changed the Arbitrator and as this Court has sent back the record to the Arbitrator, he has jurisdiction to recommence the arbitral proceedings. Same thing is repeated by the learned Arbitrator in the award in paragraph 11(b). Paragraph 11(b) reads as under :-

> "11(b) Accordingly the notices were issued to both the parties and the correspondence also made before and after commencement of arbitration proceeding, which is on record and award also made on 01/04/1998 date but the same was set aside on technical ground and the papers have been sent back to me."

. It thus appears that the learned Arbitrator

has held that he has jurisdiction to resume the proceedings because the records have been sent back to him. Merely because the original record which was called by the Court for perusal, because of request made by one of the parties are sent back to the Arbitrator from whom they were received after setting aside the award, would not authorise the learned Arbitrator to resume the arbitration proceedings. Therefore, the reason that has been given in the award for holding that he has jurisdiction to recommence the arbitral proceedings cannot be said to be proper. But it appears that before the learned Arbitrator resumed the proceedings, the respondents had written a letter dated 12th October 1998 to the learned Arbitrator. On the basis of this letter, it was contended that though this letter is not addressed to the petitioners and is addressed to the Arbitrator, this letter should be treated as a letter issued under section 21 of the said Act. Therefore, it becomes necessary to refer to that letter. Perusal of that letter shows that in paragraph 1 reference is made to the memorandum of understanding between the parties and the award made by the learned Arbitrator. Then in paragraph 2 it is stated thus :-

> "2. However, on the petitions of the said Rajendra A. Acharya and the said Nandkishore A. Acharya bearing No.225 of 1998 and 295 of

1998 respectively, the Hon'ble High Court set aside the said Award passed by you on the ground that no reasonable opportunity was given to the said Rajendra A. Acharya and Nandkishore A. Acharya, but the Hon'ble High Court refused to grant the request of the said Rajendra A. Acharya and Nandkishore A. Acharya of not referring back the said matter to you once again, but on the contrary the Hon'ble High Court by sending back the original records to you clearly indicated and clearly expressed that the parties or any of them should move you the Arbitrator afresh. We are herewith sending you a copy of the Order dated 28th September 1998 of the Hon'ble High Court which speaks for itself."

. It is clear from what is stated above that according to the respondents, because the Court did not accept the request of the petitioners to change the Arbitrator and because the Court directed that the record should be sent back to the Arbitrator and because the Court had directed that the parties should move the Arbitrator afresh, the Arbitrator was requested to start the arbitral proceedings afresh and he was asked to give notice to the parties. Section 21 has been quoted above. It contemplates that there shall be a request

made by claimant to the respondents for referring the dispute to arbitration. Reading of this letter from any point of view would not show that this letter contains a request made by the respondents to the petitioners to refer their disputes to the Arbitrator. The tenor of the letter is that because the High Court has not changed the Arbitrator and because the High Court has directed that the record shall be sent back, the learned Arbitrator is entitled to resume the proceedings. I have already found that this position cannot be said to be correct position in law. Even assuming that strict compliance of provisions of section 21 is not necessary and that substantial compliance is enough, then also the letter dated 12th October 1998, in my opinion, cannot be termed as even an attempt made to substantially comply with the provisions of section 21. In my opinion therefore, for this reason also, the award is liable to be set aside. As I have found that the award is liable to be set aside on the aforesaid ground, I do not propose to consider other grounds urged by the learned counsel appearing for petitioners for challenging the award. In the result therefore, both the petitions succeed and are allowed, the award impugned in the petitions is set aside. The respondents are directed to pay costs of these petitions to the petitioners as incurred by the petitioners.

. Parties to act on the copy of this order duly authenticated by the Associate / Private Secretary as true copy.

. Certified copy expedited.